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June 3, 1994

Via Messenger

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **GEN Docket No. 93-253**
Implementation of Section 309(j)
of the Communications Act

Dear Mr. Caton:

Submitted herewith on behalf of Cellular Settlement Groups ("CSG") are an original plus eleven (11) copies of its Petition for Reconsideration in the above-referenced docket.

Please contact my office directly with any questions or comments concerning the attached.

Respectfully submitted,

William J. Franklin
Attorney for Cellular
Settlement Groups

Encs.
cc: Cellular Settlement Groups

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act	)	**PP Docket No. 93-253**
	)	
	)	
Competitive Bidding	)	

To: The Commission

PETITION FOR RECONSIDERATION
OF CELLULAR SETTLEMENT GROUPS

Houston CUSA Settlement Group, L.C., Dallas CUSA Settlement Group, L.C., Oxnard CUSA Settlement Group, L.C., and Huntington CUSA Settlement Group, L.C., (collectively, the "Cellular Settlement Groups"), by their attorney and pursuant to Section 1.429 of the Commission's Rules, hereby seeks reconsideration of the Commission's Second Report and Order in the above-captioned proceeding.[1/] As set forth herein, the Commission potentially has erred by failing to address an important issue raised by the Cellular Settlement Groups, i.e., the acceptability of full-market settlements reached between mutually exclusive unserved-area cellular applicants.

[1/] 9 FCC Rcd ____ (FCC 94-61, released April 20, 1994) ("Second R&O"). A summary of the Second R&O was published in the Federal Register on May 4, 1994 (59 FR 22980). Pursuant to Section 1.4 of the Commission's Rules, this Petition is timely filed.

BACKGROUND AND OVERVIEW

In their Comments (at 4-11), the Cellular Settlement Groups urged the Commission's continued immediate acceptance and processing of full-market settlements for contested initial cellular applications. Most commenting parties addressing the issue support the full-market settlement of mutually acceptable cellular applications.[2/]

Those comments were not an academic exercise. The Cellular Settlement Groups were formed during September 1993, as a result of full-market settlements between the respective applicants for the Houston (MSA No. 10B), Dallas (MSA No. 9B), Oxnard-Simi Valley-Ventura (MSA No. 73B), and Huntington-Ashland (MSA No. 110A) cellular unserved areas[3/]. Another full-market settlement -- involving applicants not included within the Cellular Settlement Groups -- has been reached in the Detroit (MSA No. 5B) cellular unserved area.[4/]

In response to these comments, the Commission apparently decided to defer the cellular processing issues until a further order:

[2/] Comments of BellSouth Corporation at 15-16; Comments of Bell Atlantic Personal Communications, Inc. at 22-23; Thumb Cellular Limited Partnership Comments and Request for Immediate Processing of Cellular Unserved Area Settlement at 3-5.

[3/] Cellular Settlement Groups Comments at 1-3. Each group has complied fully with the Commission's requirements for perfecting a cellular full-market settlement, including filing signed, original settlement agreements and declarations of no consideration from all applicants in each market. Id.

[4/] Comments of Thumb Cellular, supra, at 1-2.

> The comments we received with respect to [Public Mobile Services focused almost exclusively on [one of] two issues: the applicability of competitive bidding to certain cellular radio applications pending with the Commission on July 26, 1993[55], ...
>
> [55] [W]e will address the applicability of competitive bidding to certain cellular radio applications filed prior to July 26, 1993, in a separate order. These applications present unique issues because of the special rule that Congress adopted in Section 6002(e) of the Budget Act that is applicable only to mutually exclusive applications filed prior to that date.[5/]

This Petition will become moot if the Commission permits the acceptance of the full-market settlements of the Cellular Settlement Groups in that "separate order." If not, then the Cellular Settlement Groups respectfully seek reconsideration of the Second R&O to have their Comments resolved.

THE COMMISSION SHOULD PERMIT SETTLEMENTS OF MUTUALLY EXCLUSIVE, AUCTIONABLE APPLICATIONS.

The Commission has a well-established policy favoring settlements between applicants filing mutually exclusive applications. In the cellular context, this policy developed with the Commission's acceptance of full-market wireline settlements in the Chicago and Los Angeles MSAs in 1983.[6/] At that time, Commissioner Fogarty best articulated the Commission's settlement policies:

> [T]his Commission has now twice determined that settlements by mutually exclusive cellular radio applicants are in the public interest, convenience and necessity

[5/] Second R&O at 25-26 & n.55 (footnote in original).

[6/] Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

> and will be approved by the FCC.... We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement -- and those settlements which I hope will follow on both the wireline and nonwireline sides of the split-frequency cellular allocation -- enjoy the full measure of the Commission's approval.[7/]

In applying the lottery process to cellular applications, the Commission explicitly retained its policy favoring full-market settlements.[8/] The Commission consistently has followed a similar policy permitting, if not encouraging, settlements with respect to all other radio services.

Thus, at the time Congress was considering the amendments to the Communications Act which were ultimately adopted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), the Commission had a well-established settlement policy.

Congress explicitly affirmed the Commission's settlement policy. Specifically, amended Section 309(j)(6) of the Communications Act contains the following "Rules of Construction":

[7/] Los Angeles, supra (Fogarty, Separate Statement).

[8/] Cellular Lottery Rule Making, 101 FCC 2d 577, 582 (1984), modified, 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987). Accord, Fresno Cellular Telephone Company, 1985 LEXIS 2427, *12 ("Our policy of encouraging settlements has enabled us to expedite the processing of cellular applications and thus to bring cellular service to the public with a minimum of delay."), aff'd, Maxcell Telecom Plus, supra; Telocator Network of America, 58 RR 2d 1443 (1985) (tax certificates issued to further the Commission's policy favoring full-market settlements); First Report and Order and Memorandum Opinion and Order On Reconsideration, 6 FCC Rcd 6185, 6221 (1991), reconsidered in part, 7 FCC Rcd 7183 (1992) (cellular unserved areas).

> (6) Rules of Construction.- Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-
>
> > (A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;
> >
> > * * *
> >
> > (E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

The Conference Report accompanying the Budget Act explained that Section 309(j)(6):

> [S]tipulates that nothing in the use of competitive bidding for the award of licenses shall limit or otherwise affect the requirements of the Communications Act that limit the rights of licensees, or require the Commission to adhere to other requirements.[9/]

These two provisions in Section 309(j)(6) clearly indicate that Congress intended the Commission to carry forward its existing settlement policies.[10/] The mandated "use [of] negotiation ... and other means in order to avoid mutual exclusivity in applica-

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[9/] Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, 1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

[10/] Section 309(j)(1) states that, "If mutually exclusive applications are accepted for filing ..., then the Commission shall have the authority ... to grant such license ... through the use of system of competitive bidding that meets the requirements of this subsection." (Emphasis added.) Tellingly, Section 309(j)(1) does not require that the Commission must use competitive bidding, but only that it has the authority to do so in appropriate cases. That language, together with the incorporation of Sections 309(j)(6)(A)&(E) and 309(j)(7)(B) ("the requirements of this subsection") clearly indicates the legislative intent to make mutually exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

tion and licensing proceedings" can only mean that settlements (which are the product of negotiation and which avoid mutual exclusivity) are to be permitted under competitive bidding.

The Commission's auction rules are contrary to those statutory requirements. Specifically, the Commission decided that, once a short-form auction application is filed, auction applicants "will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia."[11/] Similarly, the Commission requires that all joint ventures between auction winners be formed prior to the filing of the short-form application.[12/]

In other words, the Commission proposes that, once the short-form (pre-bid) applications are filed, the parties will be prohibited from entering into joint ventures or other agreements concerning their bid. However, until the short-form applications are filed, the parties cannot enter into settlement agreements. The listing of short-form applicants tells the parties with whom they must settle, i.e., it lists all the applicants for a specific license.[13/]

Thus, the Second R&O appears to have prohibited settlements for all services by preventing the formation of post-filing joint

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[11/] Second R&O, ¶167.

[12/] Second R&O, ¶225.

[13/] See Second R&O, ¶¶167-68.

ventures or similar arrangements between all the mutually exclusive applicants for any auctionable license.[14/]

Accordingly, upon reconsideration, the Commission must clarify its generic auction rules to specify that full settlements are permissible between mutually exclusive applications for auctionable licenses, including unserved-area cellular licenses.

CONCLUSION

Accordingly, the Cellular Settlement Groups respectfully request that the Commission reconsider the Second Report and Order as set forth herein.

Respectfully Submitted,

HOUSTON CUSA SETTLEMENT GROUP, L.C.
DALLAS CUSA SETTLEMENT GROUP, L.C.
OXNARD CUSA SETTLEMENT GROUP, L.C.
HUNTINGTON CUSA
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[14/] Tellingly, the Commission never mentioned the word "settlement" or explained the regulatory or statutory purposes which its prohibition was intended to satisfy. As a matter of law, the Commission cannot be concerned that full settlements constitute "collusion" between auction bidders; Section 309(j)(6)(A) & (E) of the Communications Act evidence a Congressional requirement that settlements serve the public interest.